

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT CLARK SHANK,

Plaintiff,

V.

KILOLO KIJAKAZI, acting
Commissioner of Social Security,

Defendant.

No. 1:20-cv-01644-GSA

**ORDER DIRECTING ENTRY OF
JUDGMENT IN FAVOR OF DEFENDANT
COMMISSIONER OF SOCIAL SECURITY
AND AGAINST PLAINTIFF**

(Doc. 20, 23)

I. Introduction

Plaintiff Robert Clark Shank (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for supplemental security income pursuant to Title XVI of the Social Security Act. The matter is before the Court on the parties’ briefs which were submitted without oral argument to the United States Magistrate Judge.¹ Docs. 20, 23–24. After reviewing the record the Court finds that substantial evidence and applicable law support the ALJ’s decision. Plaintiff’s appeal is therefore denied.

II. Factual and Procedural Background²

On September 18, 2018 Plaintiff applied for supplemental security income. AR 323–33. The Commissioner denied the application initially on January 31, 2019, and on reconsideration April 24, 2019. AR 256–66. Plaintiff requested a hearing which was held before an Administrative Law Judge (the “ALJ”) on April 1, 2020. AR 143–77. On April 27, 2020 the ALJ issued a decision denying Plaintiff’s application. AR 19–37. The Appeals Council denied review on September 28, 2020. AR 1–6. On November 19, 2020, Plaintiff filed a complaint in this Court. Doc. 1.

¹ The parties consented to the jurisdiction of a United States Magistrate Judge. See Docs. 8 and 9.

² The Court has reviewed the relevant portions of the administrative record including the medical, opinion and testimonial evidence about which the parties are well informed, which will not be exhaustively summarized. Relevant portions will be referenced in the course of the analysis below when relevant to the parties' arguments.

1 **III. The Disability Standard**

2 Pursuant to 42 U.S.C. §405(g), this court has the authority to review a decision by the
3 Commissioner denying a claimant disability benefits. “This court may set aside the
4 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal
5 error or are not supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180
6 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the
7 record that could lead a reasonable mind to accept a conclusion regarding disability status. See
8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). It is more than a scintilla, but less than a
9 preponderance. See *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted).

10 When performing this analysis, the court must “consider the entire record as a whole and
11 may not affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Social*
12 *Security Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citations and quotations omitted). If the
13 evidence could reasonably support two conclusions, the court “may not substitute its judgment for
14 that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112 F.3d 1064, 1066
15 (9th Cir. 1997) (citation omitted). “[T]he court will not reverse an ALJ’s decision for harmless
16 error, which exists when it is clear from the record that the ALJ’s error was inconsequential to the
17 ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

18 To qualify for benefits under the Social Security Act, a plaintiff must establish that
19 he or she is unable to engage in substantial gainful activity due to a medically
20 determinable physical or mental impairment that has lasted or can be expected to
21 last for a continuous period of not less than twelve months. 42 U.S.C. §
22 1382c(a)(3)(A). An individual shall be considered to have a disability only if . . .
23 his physical or mental impairment or impairments are of such severity that he is not
24 only unable to do his previous work, but cannot, considering his age, education, and
work experience, engage in any other kind of substantial gainful work which exists
in the national economy, regardless of whether such work exists in the immediate
area in which he lives, or whether a specific job vacancy exists for him, or whether
he would be hired if he applied for work.

25 42 U.S.C. §1382c(a)(3)(B).

26 To achieve uniformity in the decision-making process, the Commissioner has established a
27 sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §§ 416.920(a)-
28 (f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding that the

1 claimant is or is not disabled. 20 C.F.R. §§ 416.927, 416.929.

2 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in substantial
3 gainful activity during the period of alleged disability, (2) whether the claimant had medically
4 determinable “severe impairments,” (3) whether these impairments meet or are medically
5 equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1, (4)
6 whether the claimant retained the residual functional capacity (“RFC”) to perform past relevant
7 work, and (5) whether the claimant had the ability to perform other jobs existing in significant
8 numbers at the national and regional level. 20 C.F.R. § 416.920(a)-(f). While the Plaintiff bears
9 the burden of proof at steps one through four, the burden shifts to the commissioner at step five to
10 prove that Plaintiff can perform other work in the national economy given her RFC, age, education
11 and work experience. *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014).

12 **IV. The ALJ’s Decision**

13 At step one the ALJ found that Plaintiff had not engaged in substantial gainful activity since
14 his application date of September 18, 2018. AR 24. At step two the ALJ found that Plaintiff had
15 the following severe impairment: valvular heart disease with history of multiple surgical
16 procedures. AR 25. At step three the ALJ found that Plaintiff did not have an impairment or
17 combination thereof that met or medically equaled the severity of one of the impairments listed in
18 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 27.

19 Prior to step four, the ALJ evaluated Plaintiff’s residual functional capacity (RFC) and
20 concluded that Plaintiff had the RFC to perform sedentary work as defined in 20 C.F.R. 416.967(a)
21 with occasional exposure to vibrations and no exposure to unprotected heights, moving mechanical
22 parts, or extreme temperatures. AR 28.

23 At step four the ALJ concluded that Plaintiff could not perform his past relevant work as an
24 auto detailer or warehouse worker. AR 31. At step five, in reliance on the VE’s testimony, the
25 ALJ concluded that Plaintiff could perform other jobs existing in significant numbers in the national
26 economy, namely: document preparer, surveillance systems monitor, and order clerk. AR 31–32.
27 Accordingly, the ALJ concluded that Plaintiff was not disabled at any time since his application
28 date of September 18, 2018. AR 32.

1 **V. Issues Presented**

2 Plaintiff asserts two claim of error: 1) that the ALJ erred in omitting the sitting limitation
3 from the prior decision without explanation; and 2) that the ALJ erred in rejecting the opinion of
4 psychological consultative examiner Dr. Spivey.

5 **A. The Sitting Limitation**

6 **1. Applicable Law**

7 Before proceeding to step four, the ALJ must first determine the claimant's residual
8 functional capacity. *Nowden v. Berryhill*, No. EDCV 17-00584-JEM, 2018 WL 1155971, at *2
9 (C.D. Cal. Mar. 2, 2018). The RFC is “the most [one] can still do despite [his or her] limitations”
10 and represents an assessment “based on all the relevant evidence.” 20 C.F.R. §§ 404.1545(a)(1),
11 416.945(a)(1). The RFC must consider all of the claimant’s impairments, including those that are
12 not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling (“SSR”) 96-8p.
13

14 A determination of residual functional capacity is not a medical opinion, but a legal decision
15 that is expressly reserved for the Commissioner. *See* 20 C.F.R. §§ 404.1527(d)(2) (RFC is not a
16 medical opinion), 404.1546(c) (identifying the ALJ as responsible for determining RFC). “[I]t is
17 the responsibility of the ALJ, not the claimant’s physician, to determine residual functional
18 capacity.” *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). In doing so, the ALJ must
19 determine credibility, resolve conflicts in medical testimony and resolve evidentiary ambiguities.
20 *Andrews v. Shalala*, 53 F.3d 1035, 1039–40 (9th Cir. 1995).

21 “In determining a claimant’s RFC, an ALJ must consider all relevant evidence in the record
22 such as medical records, lay evidence and the effects of symptoms, including pain, that are
23 reasonably attributed to a medically determinable impairment.” *Robbins*, 466 F.3d at 883. *See also*
24 20 C.F.R. § 404.1545(a)(3) (residual functional capacity determined based on all relevant medical
25 and other evidence). “The ALJ can meet this burden by setting out a detailed and thorough
26

summary of the facts and conflicting evidence, stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)).

2. Analysis

Pursuant to 20 C.F.R. § 416.967(a):

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary *if walking and standing are required occasionally and other sedentary criteria are met.*

Social Security Ruling 83-10 further provides:

“Occasionally” means occurring from very little up to one-third of the time. Since being on one's feet is required “occasionally” at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday. Work processes in specific jobs will dictate how often and how long a person will need to be on his or her feet to obtain or return small articles.

Plaintiff contends that “where the ALJ omits the limitation in sitting found in the previous decision and adopted by the state agency medical examiners without articulated reason, this court should reverse and remand.” Plaintiff then sets out to establish that “the cases agree that sedentary work does not have a 6-hour limitation on sitting,” but that a claimant must be able to sit the full 8 hours to perform sedentary work. Br. at 6, Doc. 20 (citing *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tackett v. Apfel*, 180 F.3d 1094, 1103 (9th Cir. 1999)).

In response, Defendant contends the Ninth Circuit has recently rejected a similar argument where a claimant challenged an ALJ’s use of the term “medium work” as short-hand when posing hypotheticals to the VE without specifying 6 hours of standing/walking and 2 hours of sitting:

On appeal, Terry contends that the vocational expert’s testimony did not constitute substantial evidence supporting the ALJ’s finding regarding the availability of work for someone with Terry’s limitations because the ALJ did not reference Terry’s six-hour standing and walking limitation in his questioning of the expert.

1 ...

2 Although the ALJ's questions referenced a hypothetical individual with "the
3 capacity to do medium work," Terry argues that there is no reason to assume that
4 the expert understood this to suggest that the hypothetical person had any standing
5 or walking restrictions.

6 ...

7 We are not persuaded. "Medium work" is a term of art in disability law with a well-
8 established meaning. 20 C.F.R. § 404.1567(c). While the regulation defining
9 "medium work" does not include any express standing and walking limitation, the
10 Social Security Administration has long interpreted this language to include such a
11 restriction. In a 1983 published Social Security Ruling, the Commissioner
12 interpreted "medium work" to "require[] standing or walking, off and on, for a total
13 of approximately 6 hours in an 8-hour workday." SSR 83-10, 1983 WL 31251, at
14 *6 (Jan. 1, 1983).

15 *Terry v. Saul*, 998 F.3d 1010, 1012–13 (9th Cir. 2021).

16 The parties' arguments are better suited for a different case and a different fact pattern.
17 Plaintiff contends the ALJ should have adopted "the limitation in sitting found in the previous
18 decision" (Br. at 5), a limitation he later refers to as "the six-hour limit in sitting." Br. at 6. The
19 previous decision does not contain a 6-hour limitation in sitting. It reflects that Plaintiff can sit 6
20 to 8 hours. AR 206.

21 Thus, if Plaintiff's impairments render him physically unable to sit up to a full 8-hour work
22 day (which neither ALJ found, which the record does not appear to support, and which Plaintiff
23 makes no attempt to establish) then neither the current ALJ's RFC, nor the prior ALJ's RFC helps
24 him. Thus Plaintiff's first claim of error is misplaced.

25 Plaintiff further argues that the step five finding was unsupported because the DOT
26 descriptions of the three jobs identified by the VE "do not lend themselves to the conclusion that
27 the work includes 2 hours of standing or walking every day." See DOT 249.587-018 (document
28 preparer); 209.567-014 (order clerk, food and beverage); DICOT 279.367-010 (surveillance
systems monitor).

1 This argument is also predicated on an incorrect reading of the first ALJ's RFC. The first
2 ALJ's RFC stated 6 to 8 hours of sitting, and the gravamen of Plaintiff's argument is that the second
3 ALJ's use of the term "sedentary work" means 6 to 8 hours of sitting. The RFCs were therefore
4 identical. The two hours of standing would be a maximum, not a minimum that must be reached
5 by each identified job. A job with a 7 to 1 sit to stand ratio, or an 8 to 0 ratio, would still qualify as
6 a sedentary job based on the very authority Plaintiff cites, including the Ninth Circuit's decisions
7 cited above in *Aukland* and *Tackett* (sedentary work requires ability to sit "*most or all of* an eight
8 hour day"), and Social Security Ruling 83-10 ("standing or walking should generally total *no more*
9 *than about 2 hours* of an 8-hour workday), Zero hours is indeed "no more than 2 hours." Therefore,
10 there is no reason why three jobs identified by the VE would need to predictably involve 2 hours of
11 standing time.

14 Moreover, even if the facts were as Plaintiff envisioned and a 6-hour sitting limitation was
15 articulated by the first ALJ and/or affirmatively supported by the record here, his argument
16 concerning the permissible inferences to be drawn from the DOT job descriptions is nevertheless
17 unavailing. He asserts that the DOT descriptions of the three jobs identified by the VE do not
18 permit an inference that 2 hours of standing is required. To the contrary, a cursory review of the
19 DOT description for the first job identified by the VE (document preparer) readily permits such an
20 inference: "Prepares documents, such as brochures, pamphlets, and catalogs, for microfilming,
21 *using paper cutter, photocopying machine, rubber stamps, and other work devices.* DOT 249.587-

22 018 (emphasis added). Of the four types of instruments used to prepare documents, one of them
23 (photocopying machine) is generally used from a standing position. The inference that the job
24 requires about two hours of standing is not only permissible, it is the most natural inference to draw.

27 Finally, Plaintiff contends that "The Court should reverse and remand for the consideration
28 of whether sedentary work *exists* in today's economy." Br. at 7 (emphasis in original). At this

1 point the argument gets a bit confusing as Plaintiff appears to be using the term “sedentary work”
2 in precisely the fashion he argues it cannot be used, namely that it implies a 6-hour limit on sitting.
3 In so doing Plaintiff suggests the entire sedentary exertional category under 20 C.F.R. § 416.967(a)
4 and Social Security Ruling 83-10 is in fact wrong. But he clearly articulated his belief in the
5 preceding paragraphs that sedentary work is a well-defined category which requires the claimant
6 to sit up to 8 hours in a day, and which implies no limitation on sitting. Based on his immediately
7 preceding discussion it appears that his intent in the last sentence of his argument was to question
8 whether there are any sedentary jobs in today’s economy *which predictably require 2 hours of*
9 *standing/walking*, not to question whether any sedentary work exists in today’s economy.
10
11

12 To summarize, assuming a generous reading of the prevailing law and the existence of
13 sitting limitations (limitations not established here), Plaintiff apparently makes an argument that
14 could perhaps be distilled down as follows: 1) where a claimant’s exertional limitations limit him
15 to the sedentary occupational base, but he *also* has sitting limitations such that he can only sit 6
16 hours in a day (and not 6 to 8), this is a unique set of limitations not entirely addressed by an RFC
17 for “sedentary work”; 2) the 6 hour sitting restriction must be affirmatively added to the RFC
18 because it is not implicit in the definition of sedentary work; and, 3) once that distinct sitting
19 limitation is affirmatively added to the sedentary RFC (and its distinct status perhaps emphasized
20 to the VE), the occupational base will shrink substantially because most (if not all) jobs otherwise
21 qualifying as sedentary do not predictably involve 2 hours of standing time.
22
23

Again, it is an interesting legal argument for a different case because: 1) no adjudicator
limited Plaintiff to 6 hours of sitting; 2) there is no reason to believe such a limitation is required,
and, 3) at least 1 of the jobs identified by the VE (document prepared) would accommodate such a
restriction even if it was required.
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1 **B. Dr. Spivey's Opinion**

2 **1. Applicable Law**

3 For applications filed on or after March 27, 2017, the new regulations eliminate a hierarchy
4 of medical opinions, and provide that “[w]e will not defer or give any specific evidentiary weight,
5 including controlling weight, to any medical opinion(s) or prior administrative medical finding(s),
6 including those from your medical sources.” 20 C.F.R. § 404.1520c(a). Rather, when evaluating
7 any medical opinion, the regulations provide that the ALJ will consider the factors of supportability,
8 consistency, treatment relationship, specialization, and other factors. 20 C.F.R. § 404.1520c(c).
9 Supportability and consistency are the two most important factors and the agency will articulate
10 how the factors of supportability and consistency are considered. *Id.*

11 The RFC need not mirror a particular opinion; it is an assessment formulated by the ALJ
12 based on all relevant evidence. *See* 20 C.F.R. §§ 404.1545(a)(3). The ALJ’s duty to further develop
13 the record is triggered only where the evidence is ambiguous or inadequate to allow for proper
14 evaluation. 20 C.F.R. §404.1527(c)(3); *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001).

15 **2. Analysis**

16 Dr. Spivey conducted a psychological disability assessment on January 5, 2019. AR 651-
17 56. She identified diagnoses of mood disorder not otherwise specified, alcohol dependence in
18 remission, and bereavement. AR 654. She identified moderate limitations in Plaintiff’s ability to
19 maintain pace or persistence to complete complex tasks, to withstand the stress of a workday, and
20 to maintain emotional stability and predictability.

21 The ALJ found Plaintiff’s depression and anxiety non-severe, did not include any non-
22 exertional mental limitations in the RFC, and rejected Dr. Spivey’s opinion. In finding his
23 depression and anxiety non-severe at step two, the ALJ performed the special technique for
24 evaluation of mental impairments and found no more than mild limitations in any of the four broad

1 areas of mental functioning (the paragraph B criteria). In so concluding, the ALJ noted, *inter alia*,
2 that Plaintiff was able to attend to his personal care and hygiene, care for his son, maintain his
3 household, drive, shop, care for his dog, manage his medications, prepare meals, use public
4 transportation, use a computer, read, and manage his finances. AR 25 (citing Exhibits C3E; C4E;
5 C3F; and hearing testimony). In adopting the non-severity findings of the non-examining agency
6 psychologists, Drs. Ames-Dennard and Clay, the ALJ noted the lack of any mental health
7 evaluation or treatment. AR 26. The ALJ also noted that “the claimant has noted his activities
8 when limited are due to his physiological symptoms and not his mental health.” AR 26. In
9 specifically rejecting Dr. Spivey’s opinion, the ALJ found it inconsistent with his normal and
10 unremarkable mental status examinations and his reported activities of daily living. AR 27.
11

12 Plaintiff’s three page argument begins by underscoring that Dr. Spivey performed the only
13 mental health assessment of record. Br. at 7. Although this arguably adds to the persuasiveness of
14 the opinion, it is not a dispositive fact as the post-March 27, 2017 regulatory changes eliminated
15 the hierarchy of medical opinions. *See* 20 C.F.R. § 404.1520c(a) (“[w]e will not defer or give any
16 specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior
17 administrative medical finding(s), including those from your medical sources.”)
18

19 Next, Plaintiff takes issue with the non-examining opinions of Drs. Ames-Dennard and
20 Clay, particularly as to their analysis of Dr. Spivey’s earlier dated opinion. Specifically, Plaintiff
21 takes issue with Drs. Ames-Dennard and Clay’s opinion for several reasons including: 1) they
22 characterized Dr. Spivey’s mental status examination as “normal” despite non-delayed, immediate
23 recall of only 2 out of 3 objects; 2) they reported the raw score instead of the normed score for
24 memory; 3) Dr. Ames-Dennard did not address the proposition that Plaintiff might have DiGeorge’s
25 syndrome; and 4) Dr. Ames-Dennard did not address the wide discrepancy between auditory and
26 visual memory in the average or high average range compared to cognitive functioning as the
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1 bottom of the average range.

2 Again, these arguments are unsupported. Dr. Spivey's statement concerning the
3 "possibility of DiGeorge's syndrome" is not evidence suggestive of mental limitations. That
4 statement did not need to be addressed, and Plaintiff posits no theory as to how the mere possibility
5 of such a syndrome recognized by one examiner should be factored in to the RFC calculus absent
6 any other evidence or suggestion that he has the syndrome.

7 As to his immediate recall of 2 out 3 objects and cognitive function at the bottom of average
8 range (the 19th percentile), neither finding self-evidently supports moderate limitations in mental
9 functioning, nor undermines the non-examining psychologists' characterization of Dr. Spivey's
10 mental exam as "normal." Indeed, setting aside immediate object recall, Plaintiff overlooks the
11 other mental status examination findings identified by Dr. Spivey which were almost uniformly
12 normal save for inability to name the governor: no psychomotor disturbance; forthcoming and
13 cooperative attitude and behavior; neutral mood and congruent affect; clear and articulate speech;
14 orientation to person, time and place; unremarkable, rational thought content; linear, goal directed,
15 and organized thought process; ability to spell "World" backwards; and good insight and judgment.
16 AR 652–53.

17 Plaintiff's discussion of the ALJ's pertinent reasoning was limited to the following:
18

19 Dr. Spivey did not assume complaints of mental dysfunction and did not assume the
20 presence of grossly impaired activities of daily living. AR 652–53. Dr. Spivey did
21 assume what she professionally observed, evidence of a learning disability from a
22 true history of special education, cognitive function more than one standard
23 deviation from the mean, observable emotional problems, and a history of
24 significant cardiac malfunction. AR 653–54. Dr. Spivey assumed emotional stability
25 at the time of. The ALJ stated that Dr. Spivey based her opinion on findings
26 inconsistent with the record. The evaluation by Dr. Spivey is consistent with the
27 record. The ALJ stated that Dr. Spivey assumed the pathetic state as described by
28 Shank, but that boilerplate lacks the support of substantial evidence in the record.
Dr. Spivey assumed intact activities of daily living, emotional stability, and a work
attempt that failed for physical reasons. The ALJ did not move a single block of the
foundation upon which Dr. Spivey built her opinions. Mere conclusions drawn from
boilerplate add nothing to the basis for rejecting those carefully constructed

1 opinions.

2 It appears that one of Plaintiff's overarching points (though not stated in so many words) is
3 that it was improper to discount Dr. Spivey's opinion based on factors of which Dr. Spivey herself
4 was already aware (such as Plaintiff's daily activities and that his work attempt failed for physical
5 reasons, not mental reasons). Plaintiff contends that, by emphasizing those facts, the ALJ did not
6 displace any of the "blocks of the foundation" upon which Dr. Spivey built her opinion. This
7 suggestion is not persuasive. Consistency and supportability are the key factors to consider when
8 evaluating opinion evidence. 20 C.F.R. § 404.1520c(a). The fact that Dr. Spivey was aware of the
9 facts which render her opinion less supportable does not insulate those facts from consideration.
10 Had Plaintiff told Dr. Spivey he builds PCs from scratch in his free time, Plaintiff would agree that
11 the moderate limitation as to task complexity is not supported.

12 Moreover, when Plaintiff states that "Dr. Spivey assumed intact activities of daily living"
13 Plaintiff suggests that daily activities are either "intact" or impaired. Plaintiff's binary is too
14 simplistic. Dr. Spivey noted that Plaintiff can drive, clean, do chores, take his son to school, and
15 go to the grocery store. The ALJ noted the same facts plus several additional ones: he could care
16 for his dog, manage his medications, prepare meals, use public transportation, use a computer, read,
17 and manage his finances. AR 25 (citing Exhibits C3E; C4E; C3F; and hearing testimony). There
18 is no precise formula for what constitutes "intact" versus impaired activities of daily living. Simply
19 put, the activities Plaintiff reported to Dr. Spivey were not as extensive or indicative of mental
20 functionality as those described in the additional exhibits and hearing testimony cited by the ALJ.
21 Though not an overwhelmingly persuasive basis to reject Dr. Spivey's opinion, the ALJ's reasoning
22 was not unsound.

23 It is also not entirely clear what Plaintiff means by "The ALJ stated that Dr. Spivey *assumed*
24 *the pathetic state* as described by Shank, but that boilerplate lacks the support of substantial

evidence in the record.” Br. at 9 (emphasis added). This appears to be taking issue with the ALJ’s statement that, “The opinion appears to be based upon the claimant’s subjective statements, as there was no mental health evidence to review and consider.” If so, the point is reasonably well taken. Just because there was no mental health evidence to review does not mean that the opinion was based on Plaintiff’s subjective complaints. Had the ALJ offered no additional reasoning the explanation would fall short insofar as it ignores the importance of Dr. Spivey’s mental status exam and other assessments.

Nevertheless, there was a sufficient basis here to reject the opinion, including Plaintiff's reported activities of daily living, that he did not seek or receive mental health treatment during the relevant period for this claim, that he attributed his failed work attempts to his cardiac condition not his anxiety or depression, and the mental status examination and testing performed by Dr. Spivey which was unremarkable save for 2 out of 3 object recall, inability to name the governor, and cognitive functioning at the 19th percentile.

VI. Conclusion and Order

For the reasons stated above, the Court finds that substantial evidence and applicable law support the ALJ's conclusion that Plaintiff was not disabled. Accordingly, Plaintiff's appeal from the administrative decision of the Commissioner of Social Security is denied. The Clerk of Court is directed to enter judgment in favor of Defendant Kilolo Kijakazi, acting Commissioner of Social Security, and against Plaintiff Robert Clark Shank.

IT IS SO ORDERED.

Dated: **July 7, 2022**

s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE